

1 PAUL B. SNYDER
2 United States Bankruptcy Judge
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4 Tacoma, WA 98402

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5 **September 11, 2007**

6 MARK L. HATCHER
7 CLERK U.S. BANKRUPTCY COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA
10 _____DEPUTY

11 **UNITED STATES BANKRUPTCY COURT**
12 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

13 In re:

14 MICHAEL and CAROL KAIN,

15 Debtor.

Case No. 07-40922

MEMORANDUM DECISION

NOT FOR PUBLICATION

16 This matter is before the Court on the Objection to Confirmation of Second Amended
17 Chapter 13 Plan filed by eCAST Settlement Corporation (eCAST). After eCAST filed its
18 objection, Michael and Carol Kain (Debtors) filed their Third Amended Plan, which did not
19 resolve the issues raised in eCAST's Objection and which eCAST addressed in its Brief in
20 Support of Objection to Confirmation of Chapter 13 Plan, filed June 1, 2007. On August 3,
21 2007, the Debtors filed their Fourth Amended Plan. While the computations in this Plan vary
22 slightly from the Third Amended Plan, they remain effectively the same for purposes of
23 eCAST's objection to confirmation. Therefore, for eCAST's objection, the Court will consider
24 the most recent computations set forth in the Debtors' Fourth Amended Plan. Based on the
25 pleadings and arguments presented, the Court's findings of fact and conclusions of law are as
follows:

MEMORANDUM DECISION - 1

1 **FINDINGS OF FACT**

2 After eCAST and the Debtors filed their original pleadings and briefs on the
3 confirmation issues, the Court granted these parties, as well as the Chapter 13 Trustee, time
4 to file additional pleadings on the issues. The Debtors and eCAST have relied on their prior
5 pleadings, while the Chapter 13 Trustee filed a brief on August 2, 2007.

6 The facts of this case are not in dispute. The Debtors filed a petition for relief under
7 Chapter 13 on March 27, 2007. The Debtors are married with two dependent children.
8 According to their Amended Form B22C, the Debtors' Current Monthly Income is \$12,383.33,
9 and their annualized Current Monthly Income is \$148,599.96. The Debtors' annualized
10 Current Monthly Income exceeds the median income for a household size of four in
11 Washington State, which is \$74,432.00. The Debtor's Fourth Amended Plan proposes
12 payments of \$6,217.00 per month over an applicable commitment period of 60 months.

13 EMC Mortgage Corporation (EMC), which is a creditor secured on the Debtors'
14 residential property in Puyallup (Property), filed a proof of claim indicating a secured debt of
15 \$362,522.10. Principal and interest payments due EMC total \$3,207.00 per month. The proof
16 of claim lists a prepetition arrearage for EMC in the amount of \$19,367.21, and the Debtors
17 propose payments of \$516.00 per month on this arrearage.

18 Homecomings Financial, LLC, (Homecomings) is also secured on the Debtors'
19 Property and filed a proof of claim indicating a secured debt of \$105,758.97. Principal and
20 interest payments due Homecomings total \$1,000.06 per month. The proof of claim lists a
21 prepetition arrearage for Homecomings in the amount of \$6,695.36, and the Debtors propose
22 payments of \$176.54 per month on this arrearage.
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1 Pierce County Treasurer, also secured on the Debtors' Property, filed a proof of claim
2 indicating delinquent property taxes for 2006 and 2007 in the amount of \$8,804.16. The
3 Debtors propose payments of \$263.25 per month on this debt.

4 Thus, the total secured obligations on Debtors' Property are \$477,085.23, while the
5 scheduled Property value is \$443,824.00, leaving no equity. Pursuant to the Fourth Amended
6 Plan, the monthly mortgage payments total \$4,207.06, the monthly mortgage arrears
7 payments total \$692.54, and all of the monthly real property debt payments together total
8 \$5,162.85. The Internal Revenue Service's Local Housing and Utilities Standard for a family
9 of four in Pierce County, Washington provides for \$1,318 monthly for mortgage/rent.
10

11 The Debtors indicate in Amended Schedule J that additional monthly housing related
12 expenses total \$570.00, which includes electricity and heating, water and sewer, garbage,
13 home maintenance, and insurance. The applicable IRS Standard provides for \$463 monthly
14 for non-mortgage expenses.

15 Objecting creditor eCAST holds unsecured claims against the Debtors totaling
16 \$37,086.69, which according to eCAST amount to approximately 23% of Debtors' scheduled
17 unsecured nonpriority debt. The Fourth Amended Plan proposes a 13% dividend to
18 unsecured creditors, paying \$21,509.34 over the life of the Plan.
19

20 **CONCLUSIONS OF LAW**

21 eCAST objects to confirmation of the Debtors' Plan because it fails to apply all of the
22 projected disposable income to payments to unsecured creditors during the Applicable
23 Commitment Period, as required by 11 U.S.C. § 1325(b)(1)(B), due to excessive and
24 unreasonably high housing expenses. The primary argument by eCAST is that the
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1 Bankruptcy Code clearly limits the Debtors to the IRS Standard housing expense, in
2 accordance with 11 U.S.C. § 707(b)(2)(A)(ii).

3 The Debtors argue, and the Trustee concurs, that pursuant to 11 U.S.C.
4 § 707(b)(2)(A)(iii)(I), the Debtors are authorized to deduct their entire contractually due
5 residential mortgage debts, without regard to the IRS Standard housing expense, and need
6 not engage in a reasonable and necessary analysis. The Court agrees.

7 The Court finds persuasive, and hereby adopts, the analysis and conclusions set forth in
8 In re Edmonson, -- B.R. --, 2007 WL 2033991 (Bankr. D. N.M. July 11, 2007). In Edmonson,
9 the objecting creditor to the above-median income debtors' plan was also eCAST. Based on
10 a summary of eCAST's arguments as set forth in that case, it appears that eCAST has made
11 the same objections and arguments regarding the Debtors' housing expenses in this case as
12 in Edmonson. Edmonson, 2007 WL 2033991, at *2. The Edmonson court rejected eCAST's
13 arguments and concluded that "[t]he ability to deduct the average monthly payments on
14 secured debt is separate and distinct from the ownership expenses' under the IRS
15 Standards." Edmonson, 2007 WL 2033991, at *3 (quoting In re Carlton, 362 B.R. 402, 410
16 (Bankr. C.D. Ill. 2007), reconsideration denied, -- B.R. --, 2007 WL 1746819 (Bankr. C.D. Ill.
17 June 18, 2007)). Thus, the Debtors are authorized to deduct their contractually due secured
18 payments for their residence in accordance with 11 U.S.C. § 707(b)(2)(A)(iii), even though the
19 IRS Standard housing expense is limited to \$1,318 per month.
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21 This conclusion is further supported by Bankruptcy Judge Eugene R. Wedoff in Means
22 Testing in the New § 707(b), 79 Am. Bankr. L.J. 231, 274-75 (2005), as well as by other
23 authors on the subject, Marianne B. Culhane & Michaela M. White, Catching Can-Pay
24 Debtors: Is the Means Test the Only Way?, 13 Am. Bankr. Inst. L. Rev. 665, 676 (2005).
25

1 According to these authorities, after the Bankruptcy Abuse Prevention and Consumer
2 Protection Act of 2005 (BAPCPA), a court has no authority to question the reasonableness
3 and necessity of secured debt that is contractually due for an above-median income debtor.
4 See also, In re Austin, -- B.R.--, 2007 WL 2264062, at *11 (Bankr. D. Vt. Aug. 7, 2007). 11
5 U.S.C. § 707(b)(3), which would allow the Court to consider the totality of the circumstances in
6 reviewing for abuse, was not included in 11 U.S.C. §1325(b) so it is not applicable to Chapter
7 13 cases. eCAST has provided no authority on point to the contrary. In re Loper, 367 B.R.
8 660 (Bankr. D. Colo. 2007), cited by eCAST, is neither controlling nor persuasive. This pre-
9 BAPCPA case analyzed a debtor's mortgage expense using the reasonable and necessary
10 analysis, which is not applicable post-BAPCPA to an above-median income debtor for
11 contractually due secured debts. Furthermore, any suggestion by the Loper court that a post-
12 BAPCPA debtor's mortgage expense would be capped by the IRS Standard housing expense
13 is merely dicta, and thus merely an "individual view of [the] author of opinion and not binding
14 in subsequent cases as legal precedent." Black's Law Dictionary 454 (6th ed. 1990).

16 The arrearage payments proposed by the Debtors in their Plan, however, fall under 11
17 U.S.C § 707(b)(2)(A)(iii)(II), which authorizes a debtor to deduct average monthly payments
18 for "any additional payments to secured creditors necessary for the debtor . . . to maintain
19 possession of the debtor's primary residence . . . for the support of the debtor and the debtor's
20 dependents, that serves as collateral for secured debts." This deduction is "expressly limited
21 to cure payments necessary to retain possession of a few crucial assets like a principal
22 residence and motor vehicle needed for the debtors and dependents." Culhane & White,
23 supra, page 4, at 676; see also, Wedoff, supra, page 4, at 274-75. It appears that there has
24 been no contention that the Debtors' arrearage payments on the home mortgages are not
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1 necessary for the Debtors to maintain possession of their residence for the support of
2 themselves and their dependents. The Court concludes such payments are necessary under
3 the standard set forth in § 707(b)(2)(A)(iii)(II).

4 eCAST's objection to confirmation based on the Debtors' secured housing expenses is
5 overruled. The Court, however, does not make any other ruling regarding the Fourth
6 Amended Plan, as it appears the Trustee and others have not had an opportunity to otherwise
7 object to this latest plan.
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9 DATED: September 11, 2007

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11 Paul B. Snyder
12 U.S. Bankruptcy Judge
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